FILE COPY

MAY 29 19[illegible]
JAMES R. BROWNING

No. 876

In the Supreme Court of the United States

OCTOBER TERM, 1958

HELMS BAKERIES, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
LEE A. JACKSON,
HARRY MARSELLI,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	6
Conclusion	10
Appendix	11

CITATIONS

Cases:

Acme Breweries v. *Commissioner*, 15 T.C. 682	6
Bradford Machine Tool Co. v. *Commissioner*, 260 F. 2d 950, certiorari denied, 359 U.S. 909	7
Brown Paper Mill Co. v. *Commissioner*, 255 F. 2d 77, certiorari denied, 358 U.S. 906	7, 8, 9
Brushaber v. *Union Pac. R.R. Co.*, 240 U.S. 1	9
Carpenter, L. E., & Co. v. *Commissioner*, 264 F. 2d 230	8
Crowell-Collier Pub. Co. v. *Commissioner*, 259 F. 2d 860, certiorari denied, 358 U.S. 928	7, 8
Dayton Rubber Co. v. *Commissioner*, 249 F. 2d 2	6
Dowd-Feder, Inc. v. *Commissioner*, 173 F. 2d 673	6
Heiner v. *Diamond Alkali Co.*, 288 U.S. 502	10
Helvering v. *Ind. Life Ins. Co.*, 292 U.S. 371	9
Laughlin, Homer, China Co. v. *Commissioner*, 7 T.C. 1325	6
New Colonial Co. v. *Helvering*, 292 U.S. 435	9

507930—59——1

CITATIONS—Continued

Cases—Continued

	Page
Patent Button Co. v. *Commissioner*, 256 F. 2d 726	8, 9
Pohatcong Hosiery Mills v. *Commissioner*, 162 F. 2d 146	9
Standard Hosiery Mills v. *Commissioner*, 249 F. 2d 469	9
Stimson Mill Co. v. *Commissioner*, 163 F. 2d 269, certiorari denied, 332 U.S. 824	6, 9
Water, James F., Inc. v. *Commissioner*, 160 F. 2d 596, certiorari denied, 332 U.S. 767	9
Welch v. *Obispo Oil Co.*, 301 U.S. 190	10
White v. *Higgins*, 116 F. 2d 312	10
Williamsport Wire Rope Co. v. *United States*, 277 U.S. 551	10
Statutes:	
Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):	
Sec. 710, *et seq*	6
Sec. 713 (f)	3, 5, 6
Sec. 722	2, 4, 5, 6, 7, 9, 11
Sec. 722 (a)	6, 11
Sec. 722 (b)	2, 3, 4, 5, 6, 7, 12
Sec. 732	2, 13
Sec. 732 (c)	2, 4, 5, 7, 8, 9, 10, 14
Sec. 732 (d)	4, 14
Miscellaneous:	
H. Rep. No. 146, 77th Cong., 1st Sess., pp. 14–15	9
H. Rep. No. 2333, 77th Cong., 2d Sess., p. 149	9
S. Rep. No. 75, 77th Cong., 1st Sess., pp. 15–16	9
S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 206–207	9

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 876

HELMS BAKERIES, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The original findings of fact and opinion of the Tax Court (R. 20–57) are reported at 23 T.C. 967. The opinion of the Court of Appeals upon the first review (Pet. App. 1–12) is reported at 236 F. 2d 3. The opinion of the Tax Court on remand (R. 80–85) is reported at 28 T.C. 79. The final opinion of the Court of Appeals (R. 96–99; Pet. App. 13–17) is reported at 263 F. 2d 642.

JURISDICTION

The judgment of the Court of Appeals was entered on February 3, 1959. (R. 100; Pet. App. 18.) The petition for a writ of certiorari was filed on April 28,

1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals was correct in holding—overruling its earlier decision to the contrary upon a prior review in this same case—that, by reason of the provision of Section 732(c) of the Internal Revenue Code of 1939 that the Tax Court's determination of any question made "necessary solely by reason of * * * section 722 * * * shall not be reviewed or redetermined by any court or agency except the Tax Court", it lacked jurisdiction to review the Tax Court's denial of relief under Section 722(b)(4) of the Code for an alleged inconsistency with or a lack of evidentiary findings.

STATUTES INVOLVED

The pertinent provisions of Sections 722 and 732 of the Internal Revenue Code of 1939 are set forth in the Appendix, *infra*, pp. 11–15.

STATEMENT

The taxpayer, which operated a bakery and sold house-to-house in the Los Angeles area, petitioned the Tax Court for a redetermination of the Commissioner's disallowance of its applications for excess profits tax relief for the years 1943 through 1945. Only two issues were submitted to the Tax Court for decision: (1) whether the taxpayer was entitled to relief under Section 722(b)(2) of the 1939 Code upon the ground that its base period earnings had been depressed by reason of a price war; and (2) whether it was en-

titled to relief under Section 722(b)(4) upon the ground that it had had a change in the character of its business during the base period, due to an increase in capacity for production or operation. (R. 8–10, 13–17, 20–21, 53–54.)

After a trial on the merits, the Tax Court, in its original findings of fact and opinion (R. 20–57), decided both issues against the taxpayer. In addition to making extensive general findings and findings relating separately to the two issues (R. 21–53), the Tax Court: (1) as to the first issue, concluded (R. 36) that during the latter part of 1939 the taxpayer was involved in a price war, which was a temporary economic circumstance unusual to it during its base period, but held (R. 54) that, even assuming (without deciding) that that constituted a qualifying factor for relief under Section 722(b)(2), no relief could be granted on that ground because whatever amount of relief could possibly be awarded would not in any event result in an excess profits credit greater than that already allowed by the Commissioner under the so-called "growth formula" of Section 713(f); and (2) as to the second issue, concluded that (R. 53) there had been a change in the productive capacity of the taxpayer's business during the base period, but that lack of productive capacity was not a factor which to any appreciable extent had limited its sales, and thus held that (R. 57) "whatever changes took place in respect to petitioner's capacity for production and operation those changes did not bear the proper relationship to its increased earnings to war-

rant the granting of the relief otherwise authorized by section 722(b)(4)."[1]

On the review sought by the taxpayer in the court below, the Commissioner challenged the jurisdiction of the court to review as to the Section 722 issues, relying upon Section 732(c) of the Code.[2] As to the Section 722(b)(2) issue, the Court of Appeals concluded that, under Section 732(c), it was without jurisdiction to pass upon that issue and, accordingly, "dismissed for lack of jurisdiction." (Pet. App. 8–9; 12.) As to the Section 722(b)(4) issue, however, the Court of Appeals, upon its analysis of the taxpayer's contentions, took the view that the Tax Court's conclusion that "lack of productive capacity was not a factor which to any appreciable extent limited" the taxpayer's sales appeared to be "arbitrary and contrary to its own findings" (Pet. App. 11) and stated that the Tax Court "should have made a finding as to whether or not", if the increase in capacity for operation (reflected by the increased facilities enumerated by the court), "had been made two years earlier, a

[1] The Tax Court also found (R. 53):

"The excess profits tax paid by petitioner for the years in issue was not excessive and discriminatory. Petitioner was not entitled to a constructive average base period net income [under Section 722] which was large enough to produce a credit greater than the credit received under section 713 of the 1939 Code."

[2] The Commissioner had conceded jurisdiction as to another matter presented by the taxpayer—*i.e.*, whether there had been a review by the Special Division of the Tax Court in accordance with Section 732(d) of the Code. That point was decided adversely to the taxpayer (Pet. App. 6–7) and is of no further interest.

higher level of earnings would have been reached at the end of the base period, and, if so, the amount thereof" (Pet. App. 12). It concluded that, as to the Section 722(b)(4) issue, it was "not precluded from assuming jurisdiction" by Section 732(c), and, as to that issue, "remanded to the Tax Court for further consideration of the relief sought" by the taxpayer (Pet. App. 12).

On the remand, the Tax Court, stating that it had "carefully reconsidered the record in light of the opinion and mandate of the Court of Appeals" (R. 83),[3] found that the taxpayer's "level of earnings at the close of 1939 would not have exceeded its actual earnings at that date" and consequently that the taxpayer's reconstructed average base period net income (under Section 722) "would not exceed that" which the Commissioner had allowed under Section 713(f) (R. 85). Accordingly, the Tax Court entered a new decision (R. 85–86) to the effect that the taxpayer was not entitled to any relief, or refunds of excess profits tax, for the taxable years in question under Section 722.

On a second review sought by the taxpayer, the Court of Appeals, upon the urging of the Commissioner, reconsidered and overruled its prior decision that it had jurisdiction to review as to the Section

[3] The case was reconsidered by the Tax Court upon the same record, neither party having, in the over-six-months interim between the receipt of the mandate and the rendition of the opinion on the remand (R. 79, 85), made any effort to submit anything further to the Tax Court.

722(b)(4) issue and accordingly dismissed the second petition for review for lack of jurisdiction. (Pet. App. 13–17.)

ARGUMENT

1. The only issues presented to the Tax Court in this case involved the right to relief under Section 722(b) (2) and (4) of the 1939 Code (Appendix, *infra*, pp. 12–13) with respect to excess profits taxes for the years 1943 through 1945.[1] The Tax Court's determinations on those issues were exclusively determi-

[1] Briefly, the Second World War Excess Profits Tax Law, Section 710, *et seq.*, of the 1939 Code, imposed a tax on corporate profits in excess of a certain level or norm, called the "excess profits credit", deemed to represent the taxpayer's "normal" profits. That credit, under the method here material, was computed upon the average of the taxpayer's earnings during the "base period", the years 1936 through 1939. In arriving at that "average base period net income", the law permitted an adjustment to be made, in the case of a business which was growing during the base period, by allowing an increased credit under an automatic computation formula (the so-called "growth formula") under Section 713(f). In lieu of that automatic benefit, the law further permitted relief under Section 722 upon the basis of a "constructive average base period net income" if a taxpayer could establish that its base period income was not normal for any of the reasons specified in the statute and if it could establish "what would be a fair and just amount representing normal earnings." Section 772(a) (Appendix, *infra*, pp. 11–12).

A taxpayer could not, of course, have the benefit of both an automatic "growth formula" adjustment under Section 713(f) and relief upon the basis of "constructive" earnings under Section 722. See *Homer Laughlin China Co.* v. *Commissioner*, 7 T.C. 1325; *Acme Breweries* v. *Commissioner*, 15 T.C. 682; *Dayton Rubber Co.* v. *Commissioner*, 249 F. 2d 2 (C.A. 6). See also *Stimson Mill Co.* v. *Commissioner*, 163 F. 2d 269 (C.A. 9), certiorari denied, 332 U.S. 824; *Dowd-Feder, Inc.* v. *Commissioner*, 173 F. 2d 673 (C.A. 6).

nations of questions made "necessary solely by reason of * * * section 722", and therefore appellate review was clearly prohibited by Section 732(c) (Appendix, *infra*, p. 14).

Originally, the Court of Appeals had undertaken to review and remand with respect to the Section 722(b)(4) issue. That action, entailing a detailed examination of the Tax Court's findings and conclusions for inconsistencies or insufficiencies, clearly constituted the exercise of an appellate function in violation of Section 732(c). Now, the Court of Appeals, recognizing its error, has expressly overruled that decision, and accordingly dismissed the second petition for review for lack of jurisdiction, pursuant to Section 732(c). The present decision of the Court of Appeals is unquestionably correct, and under the circumstances no occasion for review by this Court is presented.

2. This case presents the same basic question, as to the scope and effect of the prohibition of Section 732(c) against appellate review in Section 722 cases, as was presented in three cases in which petitions for writs of certiorari have been denied at this term: No. 351, *Brown Paper Mill Co.* v. *Commissioner*, 255 F. 2d 77 (C.A. 5), certiorari denied, 358 U.S. 906, rehearing denied, 358 U.S. 942; No. 500, *Crowell-Collier Pub. Co.* v. *Commissioner*, 259 F. 2d 860 (C.A. 2), certiorari denied, 358 U.S. 928; and No. 607, *Bradford Machine Tool Co.* v. *Commissioner*, 260 F. 2d 950 (C.A. 6), certiorari denied, 359 U.S. 909.

As pointed out in the Commissioner's Memorandum in response to the petition in *Brown Paper* (No. 351), there had been consistent observance by the courts of appeals of the prohibition of Section 732(c), except for the holding of the Ninth Circuit on the first review in this case (236 F. 2d 3; Pet. App. 1–12).* The present decision by that court, expressly overruling its prior holding, removes the only divergence from the otherwise uniform pattern of appellate court decisions, and hence eliminates any need for review by this Court.

3. The assertions of denial of due process here (Pet. 8–12) are premised upon nothing more than the alleged inconsistencies in, or lack of, findings by the Tax Court—allegations substantially similar to those urged in support of the petitions in *Brown Paper* (No. 351) and *Crowell-Collier* (No. 500). No additional constitutional problem in that respect is presented by the petition in this case.

In this case, as in *Brown Paper* and *Crowell-Collier*, there was only a refusal by the Court of Appeals to examine alleged errors (inconsistencies or insufficiency of findings), in proper observance of the prohibition of Section 732(c). That refusal was fully in keeping with the congressional intent (cf. Pet.

*Even before the overruling of the prior decision of the Court of Appeals in this case, other appellate courts which had considered similar attempted reviews upon the theory of that prior holding had consistently refused to entertain them: *Brown Paper Mill Co.* v. *Commissioner*, *supra*; *Patent Button Co.* v. *Commissioner*, 256 F. 2d 726 (C.A. 6); *Crowell-Collier Pub. Co.* v. *Commissioner*, *supra*. See also *L. E. Carpenter & Co.* v. *Commissioner*, 264 F. 2d 230 (C.A. 3), decided after the overruling of the prior decision in this case.

12–15) that the review of the Commissioner's action on so-called "relief" or "abnormalities" questions under the law be limited to the Tax Court. See H. Rep. No. 146, 77th Cong., 1st Sess., pp. 14–15; S. Rep. No. 75, 77th Cong., 1st Sess., pp. 15–16; H. Rep. No. 2333, 77th Cong., 2d Sess., p. 149; S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 206–207.

The enactment of Section 732(c) by Congress was not, as urged (Pet. 16–20), contrary to the Constitution. In considering Section 732(c), the Courts of Appeals have consistently recognized that Congress had the power so to limit to the Tax Court the review of the Commissioner's action on relief[6] questions, and thus take away the further review by appellate courts normally available in ordinary Tax Court cases. See *Brown Paper Mill Co.* v. *Commissioner,* 255 F. 2d 77 (C.A. 5), certiorari denied, 358 U.S. 906, rehearing denied, 358 U.S. 942; *James F. Waters, Inc.* v. *Commissioner,* 160 F. 2d 596 (C.A. 9), certiorari denied, 332 U.S. 767; *Standard Hosiery Mills* v. *Commissioner,* 249 F. 2d 469 (C.A. 4); and *Patent Button Co.* v. *Commissioner,* 256 F. 2d 726 (C.A. 6). Indeed, the courts have sustained the right of Congress to limit the grant of relief even more, as it did in the excess profits tax law of the First World War under

[6] Section 722 was clearly a provision granting special relief as a matter of grace (see *Pohatcong Hosiery Mills* v. *Commissioner*, 162 F. 2d 146 (C.A. 3), and *Stimson Mill Co.* v. *Commissioner*, 163 F. 2d 269 (C.A. 9), certiorari denied, 332 U.S. 824), which relief may be conditioned or limited by Congress (*Helvering* v. *Ind. Life Ins. Co.*, 292 U.S. 371; *New Colonial Co.* v. *Helvering*, 292 U.S. 435; *Brushaber* v. *Union Pac. R.R. Co.*, 240 U.S. 1).

which the Commissioner's determination of relief was final. See *Williamsport Wire Rope Co.* v. *United States*, 277 U.S. 551; *Heiner* v. *Diamond Alkali Co.*, 288 U.S. 502; and *Welch* v. *Olispo Oil Co.*, 301 U.S. 190.

4. 5. Contrary to the taxpayer's assertion (Pet. 21–23), the Court of Appeals clearly had the power to overrule its prior decision and to render a new decision in appropriate compliance with Section 732(c). The "law of the case" rule is not so rigid or inflexible as to preclude a court from reexamining and, if convinced of error, overruling a prior decision. See *White* v. *Higgins*, 116 F. 2d 312 (C.A. 1). The Court of Appeals here, being so convinced of error, has overruled its prior holding. Its action, under the circumstances, was entirely correct—particularly since courts traditionally can notice matters affecting their jurisdiction at any time—and presents no conflict. (Cf. Pet. 21–22.)

CONCLUSION

The present decision of the Court of Appeals is correct in all respects. There is no conflict of decisions, and the case presents no question warranting review by this Court. The petition should, therefore, be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
LEE A. JACKSON,
HARRY MARSELLI,
Attorneys.

MAY 1959.

APPENDIX

Internal Revenue Code of 1939 (as amended, 26 U.S.C., 1952 ed.)

SEC. 722. GENERAL RELIEF—CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.

(a) *General Rule.*—In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. In determining such constructive average base period net income, no regard shall be had to events or conditions affecting the taxpayer, the industry of which it is a member, or taxpayers generally occurring or existing after December 31, 1939, except that, in the cases described in the last sentence of section 722(b)(4) and in section 722(c), regard shall be had to the change in the character of the business under section 722(b)(4) or the nature of the taxpayer and the character of its business under section 722(c) to the extent necessary to establish

the normal earnings to be used as the constructive average base period net income.

(b) *Taxpayers Using Average Earnings Method.*—The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713, if its average base period net income is an inadequate standard of normal earnings because—

* * * * * *

(2) the business of the taxpayer was depressed in the base period because of temporary economic circumstances unusual in the case of such taxpayer or because of the fact that an industry of which such taxpayer was a member was depressed by reason of temporary economic events unusual in the case of such industry,

* * * * * *

(4) The taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business. If the business of the taxpayer did not reach, by the end of the base period, the earning level which it would have reached if the taxpayer had commenced business or made the change in the character of the business two years before it did so, it shall be deemed to have commenced the business or made the change at such earlier time. For the purposes of this subparagraph, the term "change in the character of the business" includes a change in the operation or management of the business, a difference in the products or services furnished, a difference in the capacity for production or operation, a difference in the ratio of nonborrowed capital to total capital, and the acquisition before Janu-

ary 1, 1940, of all or part of the assets of a competitor, with the result that the competition of such competitor was eliminated or diminished. Any change in the capacity for production or operation of the business consummated during any taxable year ending after December 31, 1939, as a result of a course of action to which the taxpayer was committed prior to January 1, 1940, or any acquisition before May 31, 1941, from a competitor engaged in the dissemination of information through the public press, of substantially all the assets of such competitor employed in such business with the result that competition between the taxpayer and the competitor existing before January 1, 1940, was eliminated, shall be deemed to be a change on December 31, 1939, in the character of the business, or

* * * * * *

(d) *Application for Relief Under This Section.*—The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in section 710(a)(5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. * * *

* * * * * *

SEC. 732. REVIEW OF ABNORMALITIES BY THE TAX COURT OF THE UNITED STATES.

(a) *Petition to Tax Court.*—If a claim for refund of tax under this subchapter for any taxable year is disallowed in whole or in part by the Commissioner, and the disallowance relates to the application of section 711(b)(1) (H), (I), (J), or (K), section 721,

or section 722, relating to abnormalities, the Commissioner shall send notice of such disallowance to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with The Tax Court of the United States for a redetermination of the tax under this subchapter. If such petition is so filed, such notice of disallowance shall be deemed to be a notice of deficiency for all purposes relating to the assessment and collection of taxes or the refund or credit of overpayments.

(b) *Deficiency Found by the Tax Court in Case of Claim.*—If the Tax Court finds that there is no overpayment of tax in respect of any taxable year in respect of which the Commissioner has disallowed, in whole or in part, a claim for refund described in subsection (a) and the Tax Court further finds that there is a deficiency for such year, the Tax Court shall have jurisdiction to determine the amount of such deficiency and such amount shall, when the decision of the Tax Court becomes final, be assessed and shall be paid upon notice and demand from the collector.

(c) *Finality of Determination.*—If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711(b)(1) (H), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Tax Court.

(d) *Review by Special Division of the Tax Court.*—The determinations and redeterminations by any division of the Tax Court involving any question arising

under section 721(a)(2)(C) or section 722 with respect to any taxable year shall be reviewed by a special division of the Tax Court which shall be constituted by the presiding judge and consist of not less than three judges of the Tax Court. The decisions of such special division shall not be reviewable by the Tax Court, and shall be deemed decisions of the Tax Court.

U.S. GOVERNMENT PRINTING OFFICE 1958